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# In the Supreme Court of the United States

OCTOBER TERM, 1948

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

PILHAM G. WOODHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the Tax Court (R. 14-28) is reported at 8 T.C. 637, and the opinion of the Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1948. (R. 98-99.) The petition for a writ of certiorari was filed June 9, 1948, and granted October 11, 1948. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

## QUESTION PRESENTED

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to literary works of taxpayer, a nonresident alien, constitute taxable gross income within the meaning of Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code.<sup>1</sup>

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 61-69.

## STATEMENT

The facts found by the Tax Court material to the question presented are as follows:

The taxpayer, Mr. P. G. Wodehouse, is a British subject who formerly resided in France. During the taxable years 1938 and 1941 he was a nonresident alien. As a prolific and well-known writer of serials, plays, short stories, and other literary works, he has a wide reputation in the United States, and his works were accepted and published by various magazines. He sold his writings in the United States through one or more literary agents. (R. 15-16.)

On February 22, 1938, the Curtis Publishing Company (hereinafter referred to as "Curtis")

<sup>1</sup> If the decision below is reversed on this question, two other issues remain open for decision by the court below. (See fn. 7 and 8, *infra*, pp. 6-7.)

accepted for publication in the Saturday Evening Post an unpublished novel written by taxpayer entitled "The Cow-Creamer" (or "The Silver Cow") submitted to it by the Reynolds Agency, taxpayer's literary agent,<sup>2</sup> and sent its check for \$40,000 to the agent on that date. (R. 18.) The memorandum of acceptance provided in part as follows (R. 18-19):

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

#### MOTION-PICTURE RIGHTS

Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions: \* \* \* When selling motion-

<sup>2</sup> Paul R. Reynolds, a member of the Reynolds Agency, testified that the firm had been agents for taxpayer since approximately the First World War (R. 37.)

picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights.

The book publication rights to "The Cow-Creamer" were sold for \$5,000 to another publisher, Doubleday, Doran and Company. (R. 19.)

On December 13, 1938, Curtis accepted taxpayer's novel "Uncle Fred in the Springtime," subject to the same agreement of reassignment of rights as was contained in its acceptance of "The Cow-Creamer," and paid \$40,000 therefor to the Reynolds Agency. Both novels were published serially by Curtis in the Saturday Evening Post during 1939. (R. 19-20.)

On July 23, 1941, the Reynolds Agency sold to Hearst's "International-Cosmopolitan Magazine" (hereinafter called "Hearst's") for \$2,000 all the American and Canadian serial rights to an article entitled "My Years Behind Barbed Wire," written by taxpayer.<sup>3</sup> (R. 25.)

On August 12, 1941, the Reynolds Agency sold to Curtis for \$40,000 all the North American (including Canadian) serial rights to "Money in the Bank," a novel written by taxpayer.<sup>4</sup> (R. 25.)

<sup>3</sup> The agreement with Hearst's was stated in terms of a purchase by Hearst's of the serial rights (R. 79-80) rather than, as in the case of the transactions with Curtis, a transfer of all rights subject to reassignment of all rights other than the serial rights.

<sup>4</sup> Curtis' letter transmitting its check contained the same arrangement for reassignment of all rights except serial rights as in the case of "The Cow-Creamer." (R. 81-82)

The Reynolds Agency, as withholding agent, withheld from and paid the income tax on each of the lump sum payments received from the publishers and the payments were treated as taxable income by taxpayer and his wife, the wife having reported one-half of the 1938 payments by the publishers as her income under an assignment to her by taxpayer of one-half of his interest in "The Cow-Creamer" and "Uncle Fred in the Springtime."<sup>5</sup> After the Commissioner determined deficiencies in taxpay-

<sup>5</sup> As to the Tax Court's treatment of the payments as income, see R. 6, 8, 18, and 21-23.

In connection with the withholding of tax on the 1938 and 1941 payments, the Tax Court specifically found that, in accordance with taxpayer's assignments to his wife (R. 18), the Reynolds Agency remitted to taxpayer and his wife each the sum of \$17,100 after deducting commissions and taxes from the \$40,000 received from "The Cow-Creamer" and similarly sent taxpayer and his wife each \$17,000 to cover the proceeds of \$40,000, less charges, from "Uncle Fred in the Springtime" (R. 19). While the Tax Court did not mention the payment of income tax on the \$5,000 received by the Reynolds Agency from Doubleday, Doran and Company for the book publishing rights to "The Cow-Creamer" nor the payment of income tax on the total of \$42,000 received in 1941 from the two publishers, Hearst's and Curtis, for the serial rights to "My Years Behind Barbed Wire" and "Money in the Bank," the record shows that the Reynolds Agency also withheld and paid the income tax on such proceeds. Paul R. Reynolds, a member of the firm, testified as follows in answer to a question as to the arrangement for handling the funds received from the Saturday Evening Post, the Curtis publication (R. 36):

We collected the money, took our commission, retained any other charges, *withheld the non-resident alien income tax* and paid the proceeds to Mr. Wodehouse or to Mr. and Mrs., if the story was assigned to Mrs. [Italics supplied.]

The Commissioner's deficiency determinations also show that income tax had been withheld at source and paid in 1938 and 1941. (See R. 7, 9.)

er's income tax for years including 1938 and 1941, taxpayer filed a petition in the Tax Court which not only questioned the correctness of the bases of the Commissioner's deficiency determinations,<sup>6</sup> but sought refunds for overpayment of income tax (R. 14-15) on the ground that the payments received from the publishers through the Reynolds Agency were not subject to tax (R. 2).

The Tax Court held that the \$85,000 paid by Curtis and Doubleday, Doran and Company in 1938 for serial and book rights, respectively, to taxpayer's novels and the \$42,000 paid by Curtis and Hearst's in 1941 for serial rights represented advance royalties and that, as such, they were taxable as "other fixed or determinable annual or periodical gains" within the meaning of Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code. (R. 26.) The other issues in the case were also decided against taxpayer except as to his right to a deduction for attorneys' fees.<sup>7</sup>

<sup>6</sup> The Commissioner's deficiency determination for 1938 was based on a determination that \$40,250 (one-half of the gross proceeds from "The Cow-Creamer" and "Uncle Fred in the Springtime"), reported as income of taxpayer's wife, constituted taxable income to taxpayer. (R. 6.) For the year 1941 the Commissioner's deficiency determination was based on an increase in taxpayer's income from Doubleday, Doran and Company and on the disallowance of a deduction for attorneys' fees and of an exclusion from income of an amount treated by taxpayer as allocable to royalties earned outside the United States. (R. 8.)

<sup>7</sup> The Tax Court held that the anticipatory assignments by taxpayer to his wife of a one-half interest in the two novels "The Cow-Creamer" and "Uncle Fred in the Springtime"

On appeal the Court of Appeals, for the Fourth Circuit reversed the decision of the Tax Court on the main issue as to the taxability of the payments under Section 211 (a) (1) and did not decide the other issues.<sup>8</sup> Judge Dobie dissented on the ground that the decision of the Tax Court should be affirmed on the authority and reasoning of *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862. (R. 90-98.)

#### SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the payments made by publishers to taxpayer's United States literary agent in the taxable years 1938 and 1941 were and are to be treated as the proceeds from the sale of personal property and in failing to hold that the payments were and should be treated as advance royalties.

were not the result of a real donative intent and lacked reality and that therefore the payments made to taxpayer's wife in 1938 under the assignments were income of taxpayer; that, since the inclusion in taxpayer's income of the amounts paid to his wife concededly increased his income above the statutory 25 percent, the statute of limitations did not bar the assessment of an additional tax against taxpayer for 1938; and that no part of the payments made in 1938 and 1941 by the publishers constituted income from sources outside the United States so as to be excludible from taxpayer's gross income in those years. (R. 21-23, 26-27.)

<sup>8</sup> In the Court of Appeals taxpayer contended in the alternative that his assignments to his wife were effective to transfer to his wife one-half of the 1938 tax liability on the payments made by the publishers in 1938 and that at least 6 percent of the payments for both 1938 and 1941 should be excluded from his gross income as being allocable to sources outside of the United States. The Court of Appeals found it unnecessary to decide those issues in view of its holding that the 1938 and 1941 payments were not taxable at all. (R. 98.)

2. In holding that the payments were not "other fixed or determinable annual or periodical gains" within the meaning of Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

#### SUMMARY OF ARGUMENT

Taxpayer, a nonresident alien not engaged in trade or business in the United States, is taxable under Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code on the amount received as "interest \* \* \* dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income". Contrary to the decision below, which is in direct conflict with *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U. S. 862, the italicized language covers lump sum royalties, and the payments made in 1938 and 1941 by United States publishers to taxpayer, through his United States literary agent, were lump sum royalties for the purposes of the statute.

1. Each payment made by the publishers was a lump sum royalty for a license. This necessarily follows from the fact that taxpayer, instead of granting his entire right, title and interest in each of the literary works involved and in the copyrights to be obtained on them, granted only the use of each literary work for a limited purpose—for magazine and newspaper publication (the serial

rights) and in one instance for book publication. Such a limited grant is a license and not a sale. While the grant of a limited right under a copyright may, in a broad sense, be characterized as a "sale", it is clear that it is not treated as such for the purposes of Section 211(a)(1).

In connection with the imposition and withholding of tax on the income of nonresident aliens, Section 119 of the Revenue Act of 1938 and of the Internal Revenue Code, which contains the same provisions as those for years contained in previous Revenue Acts, defines and classifies income from sources within the United States. The section separately covers gain from sales of property and "Rentals and royalties". The latter are covered by Section 119 (a)(4) and include rentals and royalties "for the use of or for the privilege of using in the United States \* \* \* copyrights \* \* \*". This language is sufficiently broad to cover not only payments for the use of copyrights *already* obtained by an author but payments made under arrangements, such as those with Curtis in the present case, for the use of the statutory copyright *to be* obtained by magazine publication. Moreover, Section 119 (a)(4) is not by its terms limited to royalties paid periodically. Thus, the Treasury Department ruled in 1933 that it covers lump sum payments for a limited right under a copyright, and in 1938 it was so held in

*Sabatini v. Commissioner*, 98 F. 2d 753 (C.C.A. 2d), which since then has consistently been followed with the exception of the decision below. The connection between the *Sabatini* decision involving Section 119 (a) (1) on the one hand and the identical coverage of Section 211 (a) (1) and the withholding provision on the other has been so apparent that tax on the payments made to taxpayer in the present case was withheld at the source in 1938 and 1941 by taxpayer's United States literary agent, as was tax on the payments involved in the *Rohmer* case. In addition, the legislative history of Section 211 (a) (1) shows that, in adopting the language of the withholding section as a definition of the income to be taxable after 1936 as to nonresident aliens not engaged in trade or business in this country, Congress did not intend to relieve such nonresident aliens of tax on "Rentals and royalties" as defined in Section 119 (a) (4).

2. The holding of the court below that the publishers' payments to taxpayer through his United States literary agent are not covered by Section 211 (a) (1), because being single sums they were not paid annually or periodically, violates established criteria of statutory interpretation. As this Court has stated, the intention of Congress is to be ascertained not by taking a word or clause from its setting and viewing it apart, but by considering it in connection with its context, the general purposes

of the statute in which it is found, and the occasion and circumstances of its use.

The language of Section 211 (a)(1) itself shows that it is not limited in its coverage to payments which are made annually or periodically. The statute taxes the amount received from sources within the United States as interest, rent, compensation, etc., "or other fixed or determinable annual or periodical gains, profits, and income." Under the familiar rule of *ejusdem generis* the quoted general language means income of the same type as those categories of income specifically mentioned, and the statute thus defines the nature or type of income taxed, regardless of the manner of payment. The House and Senate reports in connection with the original enactment of Section 211 (a)(1), the language of which was adopted from the withholding at source provision which had been in effect as to nonresident aliens since 1917, not only so interpreted the statute but attached no significance to the words "annual or periodical" except as perhaps making it more clear that the statute did not cover gain from the sale of property, the general language of the statute quoted above being interpreted as meaning "other fixed and determinable income" and "other fixed and determinable income (not including capital gains)." It is also evident that as far back as 1917 and through all the intervening years Congress attached no importance to the words "annual or

periodical," for the information at source provision as to citizens has since 1917 covered the very same categories of income specifically mentioned in Section 211 (a) (1), with the exception of dividends added in 1936, and "other *fixed or determinable* gains, profits, and income" while at the same time, since 1917, the provision for withholding at source has covered the same specified categories of income and "other *fixed or determinable annual or periodical* gains, profits, and income." The two general phrases were used interchangeably in a legislative report in 1918 referring to the two statutes.

The court below was plainly in error in thinking that an interpretation of Section 211 (a) (1) in accordance with the legislative materials would amount to an excision of the words "annual or periodical". In adopting its own interpretation of the words "annual or periodical" as meaning "paid annually or periodically", the court below took the words "annual or periodical" from their context and failed to recognize that, since the whole phrase "fixed or determinable annual or periodical gains, profits, and income" is merely descriptive of the categories of income *specifically* listed, it is immaterial whether those categories of income are described as "fixed or determinable" income or as "fixed or determinable annual or periodical" income. It is still "other" income of the same type which is covered under the general phrase "other

fixed or determinable annual or periodical gains, profits, and income."

Section 211 (a) (1), properly construed, clearly covers lump sum royalties, including those involved in the present case. Congress plainly regarded the specified categories of income as being of the "fixed or determinable" type, exclusive of capital gains, and lump sum royalties are income of the quoted type, being wholly income when paid. Further, the legislative purpose in enacting the statute in 1936, as shown by the House and Senate reports, was, so far as pertinent here (aside from the collection of additional revenue), simply to relieve nonresident aliens not engaged in trade or business in this country of tax on capital gains which it had been found administratively impossible in most cases to collect effectually and, since Section 119 draws a distinction between "Rentals and royalties" and gain from the sale of property, Congress must have intended that nonresident aliens not engaged in trade or business in this country should remain taxable on "Rentals and royalties" as defined in Section 119 (a) (4), which includes the lump sum royalties received by taxpayer. Moreover, the reason for the exemption of tax on gain from the sale of property—the impossibility in most cases of collecting the tax effectually—is one which cannot be related to lump sum royalties for the use of a copyright, which are wholly income when paid and easily collectible